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ALEXANDER L. STEVAS

No. 80-1477

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS R. CRUZ, PETITIONER

v.

H. S. KNIGHT, DIRECTOR,
UNITED STATES SECRET SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner, a Secret Service agent, contends that the Service's decision to transfer him from Miami to Newark deprived him of property without due process of law.

1. Petitioner is a GS-13 Special Agent in the United States Secret Service who has been assigned to the Service's Miami, Florida, office since 1966 (Complaint 1, 3). On May 2, 1979, petitioner received notification that the Service intended to transfer him to its office in Newark, New Jersey (C.A. App. 38a).[1] One week later, petitioner requested that the transfer be cancelled for the convenience of his family (C.A. App. 39a-40a). This request was denied with the explanation that transfers and reallocations of resources

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[1] "C.A. App." refers to petitioner's appendix in the court of appeals.

are necessary in order to carry out the function of the Secret Service and that family convenience could not be permitted to become a decisive factor in transfer decisions (C.A. App. 41a-42a).

Thereafter, petitioner instituted formal grievance proceedings to challenge his transfer (C.A. App. 43a-45a). In response to petitioner's grievance, the Acting Deputy Director of the Secret Service noted that Section 133.23 of the Secret Service Manual provides that "all employees must be ready to accept assignments anywhere within the territorial jurisdiction covered by this Service," and concluded that the transfer was justified for the needs of the Service (C.A. App. 46a). At petitioner's request, a grievance examiner was designated to review the case (C.A. App. 54a).

On September 11, 1979, following his inquiry into the matter, the grievance examiner recommended that the transfer order be sustained (C.A. App. 56a-58a). On September 14, 1979, petitioner, through counsel, submitted comments to the Deputy Director opposing the examiner's recommendation (C.A. App. 68a-70a). On October 1, 1979, after consideration of the entire grievance file and petitioner's comments, the Deputy Director sustained the transfer order (C.A. App. 71a). In his decision, the Deputy Director explained that, because of the heavy concentration of Hispanics in the Northern New Jersey area, the needs of the Service required assignment of a Spanish-speaking special agent to the Newark office.

On October 19, 1979, petitioner instituted a second grievance, claiming that the Service had failed to comply with its grievance procedures in handling his first grievance (C.A. App. 72a-74a). This grievance was also denied (Complaint 9, Exh. 4).

2. Petitioner then filed this action in the United States District Court for the District of Columbia seeking declara-

tory and injunctive relief. Petitioner argued that he had been denied due process because of various procedural defects in the processing of his grievance. The district court granted the government's motion to dismiss the action (Pet. App. 3a-6a). After examining the entire grievance file and the regulations governing grievance procedures, the court concluded that the grievance examiner had substantially complied with the regulatory procedures and that "any minor deviations from the required procedures which might have occured did not adversely affect [petitioner]" (*id.* at 5a). The court also concluded that the Service had ample authority to transfer petitioner and that "the transfer was for the 'efficiency of the service' because it was designed to use [petitioner's] experience and special skills in a manner thought most useful by management" (*ibid.*). The court of appeals affirmed without opinion (Pet. App. 1a-2a).

3. The decision of the court of appeals, affirming the district court's order, is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of petitioner's essentially fact-bound claim is therefore not warranted.

Federal agencies have broad discretion in transferring personnel to a different locality, and judicial review of such discretionary decisions, if it exists at all, is narrowly circumscribed. See, *e.g.*, *Bullard* v. *Webster*, 623 F. 2d 1042 (5th Cir. 1980), petition for cert. pending, No. 80-1228 (filed Jan. 19, 1981); *Leefer* v. *Administrator, NASA*, 543 F. 2d 209 (D.C. Cir. 1976); *Kletschka* v. *Driver*, 411 F. 2d 436 (2d Cir. 1969).[2] The Deputy Director of the Secret Service specifically found that the need for a Spanish-speaking agent in the Newark office justified the transfer. Petitioner,

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[2]A transfer decision is not an "adverse action" to which statutory procedural protections apply. See 5 U.S.C. (Supp. III) 7511-7513; *Leefer* v. *Administrator, NASA*, *supra*, 543 F. 2d at 213.

in apparent recognition of the agency's discretion to determine the needs of the Service, does not directly challenge this determination. Rather, he contends (Pet. 12-13) that a Secret Service memorandum concerning transfers and reassignments created a constitutionally protected property interest of which petitioner was deprived by the transfer. However, this memorandum simply states that permanent transfers of employees classified above GS-12 "may be made according to the needs of the Service" (Pet. App. 23a). Furthermore, Section 133.23 of the Secret Service Manual specifically provides that "all employees must be ready to accept assignments anywhere within the territorial jurisdiction covered by this Service" (see C.A. App. 46a). The memorandum on which petitioner relies thus did not create a property entitlement to be assigned to any particular location. Hence, petitioner's reassignment did not deprive him of any property interest. See *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

In any event, even assuming that petitioner had a property entitlement in remaining at the location to which he was assigned, the procedural protections that petitioner received afforded him whatever process was due. Petitioner pursued informal and formal grievance procedures. The record reflects that prior to filing his formal grievance, petitioner was informed that his reassignment was for the purpose of utilizing his skills as an agent in a way most advantageous to the Secret Service (C.A. App. 41a-42a). A grievance examiner from outside the Secret Service was appointed to review the case. Prior to the final decision, petitioner was afforded an opportunity to present, with the assistance of counsel, a written response to the grievance examiner's findings and recommendation. The final decision denying petitioner's grievance was made after consideration of the grievance examiner's report and petitioner's comments, and was based on the conclusion that the transfer was justified by the needs of the Service. Given the

discretionary nature of transfer decisions and the limited nature of the deprivation, if any, that may be created by such decisions, this grievance procedure was sufficient to satisfy the requirements of due process. See *Mathews* v. *Eldridge*, 424 U.S. 319, 332-335, 341-349 (1976); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 894-895 (1961).

Petitioner further contends (Pet. 15-17) that he was adversely affected by the Service's deviations from grievance procedure regulations. This argument is without merit. The grievance procedure regulations in effect at the time of petitioner's grievance provided that the grievance inquiry should be of a nature and scope appropriate to the issue involved and that the decision whether to conduct a hearing was a matter within the discretion of the grievance examiner (5 C.F.R. 771.116(d) (1979); Pet. App. 17a).[3] Thus, the failure to afford petitioner a hearing was not a "deviation" from the regulations.

Petitioner complains, however, that the grievance examiner failed to make the grievance file available to petitioner for review and comment before preparing his findings and recommendation on the grievance, as required by 5 C.F.R. 771.116(g) and (h) (1979) (Pet. App. 20a).[4] But even if petitioner and his attorney did not have an opportunity to review and comment on the grievance file prior to the examiner's recommendation, the record clearly shows that

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[3]Current regulations state that agency grievance procedures must provide for fact-finding, when appropriate, and "shall include a hearing when one is suitable to ascertain the circumstances concerning the grievance." 5 C.F.R. 771.302(b).

[4]This issue is not likely to arise with any frequency because the current regulations do not require a two-tiered system of review. See 5 C.F.R. 771.302(f)(2) (providing that the decision on an employee grievance may be made by "[t]he official(s) designated to determine the disputed facts").

they had that opportunity prior to the Service's final decision on the grievance. The Deputy Director's final decision was rendered after a thorough review of the grievance file and after consideration of information presented by petitioner's attorney. As the district court concluded (Pet. App. 5a), petitioner was not prejudiced by any minor deviations from the required grievance procedures.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
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